

Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [REDACTED]: [REDACTED]: [REDACTED]: TL-N-1190-00
[REDACTED]

date:

JUN 15 2000

to: Chief, Examination Division
Attn: [REDACTED], Group Manager

from: District Counsel, [REDACTED] District, [REDACTED]

subject: [REDACTED]: Disclosure of a Third Party Contact

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum is being issued in order to clarify and emphasize a point made in an earlier memorandum from our office dated April 11, 2000, regarding the above-referenced taxpayer. You had requested our advice regarding the nondisclosure of the identity of a third party source/expert in the [REDACTED] case. A copy of that memorandum is attached for your reference.

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The third party source/expert, [REDACTED], was initially contacted and interviewed by IRS personnel in order to assist in the factual development of the case. [REDACTED] was later hired by the IRS as an expert to assist in the valuation of the taxpayer's assets. During the IRS' contacts with [REDACTED] expressed concern that his financial interests could be jeopardized by his dealings with the IRS. IRS personnel sought to keep his identity confidential and did not release his name to the taxpayer as a third party contact.

In our April 11, 2000 memorandum, we advised you that reprisal concerns raised by [REDACTED] needed to be evaluated by the Service employee making the contact. Any such concerns should be taken at face value and the proper record keeping procedures under I.R.C. § 7602(c) should be followed. We noted, however, that his identity might not be protected under a FOIA request or a discovery request made by the taxpayer. In addition, we also pointed out that if this case proceeded to trial, [REDACTED] might be required to testify on behalf of the government, in accordance with his employment contract, in support of the government's case.

We wish to emphasize that [REDACTED] occupied different roles during the course of his relationship with the IRS and the applicability of I.R.C. § 7602(c) varies with each role he played. Up until the time he was hired as an expert witness, the third party contact rules would apply but his identity would not be subject to disclosure based upon his fear of reprisal. For the time he worked as an expert, [REDACTED] would be treated as an employee of the service. In that capacity his identity would not be shielded from disclosure under the reprisal exception of I.R.C. § 7602(c), but the Service is not required by § 7602 to inform the taxpayer that he was hired by the Service.

Experts hired by the Service operate under the same disclosure restrictions as IRS employees. The disclosure provisions of I.R.C. § 7602(c) do not apply to contacts between or among Service employees. The taxpayer may be able to learn of [REDACTED]'s relationship with the Service in the same way that it may be able to learn the identity of anyone else who works for the Service.

CC: [REDACTED]: [REDACTED]: [REDACTED]: TL-N-1190-00

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If you have any further questions regarding this matter,
please contact [REDACTED] at [REDACTED].

[REDACTED]
Assistant District Counsel

By:

[REDACTED]
Senior Attorney

cc: Field Service
Assistant Regional Counsel (TL)

Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [REDACTED]: [REDACTED]: [REDACTED]: TL-N-1190-00
[REDACTED]

date: APR 11 2000

to: Chief, Examination Division
Attn: [REDACTED], Group Manager
[REDACTED], Group Manager

from: District Counsel, [REDACTED] District, [REDACTED]

subject: [REDACTED]: Disclosure of a Third Party Contact

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You have requested our advice regarding the nondisclosure of the identity of a third party source/expert in this case. Based upon information provided by your office, the facts are as follows.

Facts

In October of [REDACTED], your office sought to hire an outside expert to assist in the valuation of the [REDACTED] team. The [REDACTED] had been acquired by the [REDACTED] in [REDACTED] for \$ [REDACTED]. The price paid was for the entire operation, the staff and the [REDACTED] franchise for the [REDACTED] market. During the course of the audit, the revenue agent determined it would be necessary to allocate the purchase price among the various assets, tangible and intangible, including player contracts, that were acquired. This would be a difficult task that would require specialized expertise. After consultation with Engineer [REDACTED], it was determined that there was no one available in-house with expertise comparable to a qualified outside valuation expert. Your office requested our opinion regarding the advisability of hiring an outside expert. On October 23, [REDACTED], we provided you with our recommendation that based on the information provided, the specialized expertise of an outside expert was required and an expert should be hired. Revenue Agent [REDACTED] and sports industry specialist [REDACTED] made similar recommendations.

During the first week of December [REDACTED], several outside appraisers were interviewed by [REDACTED], [REDACTED], [REDACTED], and the undersigned. One of those outside appraisers, [REDACTED] of [REDACTED] was subsequently hired by your office to provide a written expert report valuing the entire [REDACTED] operation, including player contracts.

In January [REDACTED], Engineer [REDACTED] made his first contact with the subject of this memorandum, [REDACTED].

[REDACTED] . Following several conversations/meetings between [REDACTED] and [REDACTED], our office was advised that [REDACTED] would be a valuable source of information regarding the inner workings of both the [REDACTED] and the [REDACTED]. Also, that [REDACTED] could provide assistance to [REDACTED]. [REDACTED] found [REDACTED] to be extremely knowledgeable in "evaluating the [REDACTED] players and interfacing with the [REDACTED]." [REDACTED] concluded that his report writing preparation would assist the examination team and counsel in testifying in court, and that he would make an

excellent witness.¹ [REDACTED] was subsequently hired and placed under contract to prepare a written report on the internal operations of the [REDACTED] and its operating entities, the interaction between the [REDACTED] and local teams, and local team operations. [REDACTED] was also retained to review and comment on the work of other outside appraisers. For these services [REDACTED] was to be compensated in the amount of \$ [REDACTED]. It is our understanding that [REDACTED] has completed his contract.

Subsequent to his retention as an expert in January of [REDACTED], [REDACTED] raised concerns about keeping his identity confidential. We have recently been provided with a copy of a memorandum to the file, prepared by Engineer [REDACTED] on August 5, [REDACTED]. The memorandum states that [REDACTED] fears retaliation from the [REDACTED], the [REDACTED] and other individuals. Based on [REDACTED]'s concerns, [REDACTED] wishes to keep his identity confidential and to date, [REDACTED]'s name has not been released to the taxpayer as a third party contact.

Legal Analysis

The Restructuring and Reform Act of 1998 added a new subsection to I.R.C. § 7602. In general, I.R.C. § 7602(c) provides that an officer or an employee of the Internal Revenue Service may not contact a person other than the taxpayer with respect to the determination or collection of the taxpayer's liability without providing advance notice that such contacts may be made. The statute requires the Service to keep a record of the contacts and to provide such record to the taxpayer, both on a periodic basis and upon a taxpayer's request. The statute applies to contacts made after January 18, 1999.

I.R.C. § 7602(c) contains three exceptions, one of which involves the issue of reprisal.² Specifically, the statute does not apply if the Secretary determines for good cause shown that following its provisions would jeopardize collection of any tax or may involve reprisal against any person. If a Service employee determines that providing the taxpayer with advance notice or a record of a specific contact may involve reprisal against any person, then a Form 12175 should be sent to the RRA

¹ See Expert Witness Procurement Memorandum - Sole Source [REDACTED], dated March 9, 1999, Attachment 4.

² Secondly, the statute does not apply to any contact which the taxpayer has authorized. The third statutory exception concerns pending criminal investigations.

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Reprisal determinations should generally be made on a case by case basis, based on facts known to the Service employee making the contact. Any concern that is raised by the third party regarding reprisal should be taken at face value. However, a general desire for confidentiality, without more, is insufficient to determine that the reprisal exception applies. Chief Counsel Notice N(35)000-160(a). The authority to determine whether the reprisal exception applies has been delegated to all non-Chief Counsel employees who might make I.R.C. § 7602(c) contacts.

It is important to note that third parties such as [REDACTED] [REDACTED] should not be advised that under no circumstances will their identities be revealed. I.R.C. § 7602(c) does not provide third parties with any additional protections other than what is provided in that statute. The reprisal exception of I.R.C. § 7602(c) only allows the Service to withhold notice of a particular third party contact from the list of specific persons contacted that is provided to the taxpayer. A third party is not provided with any additional protection from other investigative avenues available to the taxpayer. For example, if the taxpayer submitted a request for his file under the Freedom of Information Act, an exemption under the FOIA provisions would have to be applicable in order to withhold information regarding the third party.

FOIA exemption 7D does protect the identity of a confidential source. However, confidential source status only applies where the source has expressly requested confidentiality, or where, given the circumstances, a reasonable person would believe that the source provided information only because he believed that his identity would remain confidential. Not all third party contacts with respect to whom a reprisal determination is made will meet the criteria to be a confidential source. This exemption may be asserted in appropriate circumstances, but supporting documentation must be maintained since the Service would have to rely upon that documentation to prove the predicate for the exemption.

There is also a privilege against disclosing the identity of an informer in civil litigation. CCDM 35.5.13.11. See generally, Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 763 (D.C. Cir. 1965). In general, the Tax Court will perform a balancing test between the public interest in effective law enforcement with the fundamental requirement of fairness to the party litigant. Weimerskirch v. Commissioner, 67 T.C. 672, rev'd on other grds, 596 F.2d 358 (9th Cir. 1979).

In this case, if a FOIA request is filed, Disclosure will have the duty to determine whether [REDACTED] is entitled to confidential source status. However, if, as anticipated, this case becomes docketed in Tax Court, there is a strong likelihood that we will have to disclose the identity of a third party such as [REDACTED]. This would be especially true if we could not support our adjustment without his testimony of the third parties. Here [REDACTED] was hired as an expert, a written report was commissioned, and his courtroom testimony was anticipated in his contract proposal. In addition, he was retained to provide assistance and act as a source of information for another expert, [REDACTED]. Under these circumstances, [REDACTED] would almost certainly be called as witness. Moreover, even before the case went to trial, we may need to identify third parties such as [REDACTED] in response to a discovery request from the taxpayer. This would have to be evaluated on a case by case basis.

Conclusion

Reprisal concerns raised by [REDACTED] should be evaluated by the Service employee making the contact. Any such concerns should be taken at face value and the proper record keeping procedures under I.R.C. § 7602(c) should be followed. We note, however, that [REDACTED]'s identity may not be protected under a FOIA request or a discovery request made by the taxpayer. In addition, if this case proceeds to trial, [REDACTED] may be required to testify on behalf of the government, in accordance with his contact, in support of the government's case.

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If you have any further questions regarding this matter,
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[REDACTED]
Assistant District Counsel

By:

[REDACTED]
Senior Attorney

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